

1 The opinion in support of the decision being entered today was *not* written
2 for publication in and is *not* binding precedent of the Board.

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4 UNITED STATES PATENT AND TRADEMARK OFFICE

6
7 BEFORE THE BOARD OF PATENT APPEALS
8 AND INTERFERENCES

10
11 *Ex parte* ANDREW S. VAN LUCHENE, JOHN C. CAINE,
12 KATHLEEN VAN LUCHENE, MICHIKO KOBAYASHI,
13 RONALD E. ZEPP, II, and ROBERT J. ANDERSON

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16 Appeal 2007-0790
17 Application 09/586,742
18 Technology Center 3600

20
21 Decided: March 15, 2007

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24 Before JENNIFER D. BAHR, STUART S. LEVY, and ANTON W. FETTING,
25 *Administrative Patent Judges.*

26 FETTING, *Administrative Patent Judge.*

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28 DECISION ON APPEAL

29
30 STATEMENT OF CASE

31
32 This appeal involves claims 95-97, the only claims pending under
33 consideration in this application. We have jurisdiction over the appeal pursuant to
34 35 U.S.C. §§ 6 and 134.

1 We AFFIRM and ENTER A NEW GROUND OF REJECTION UNDER 37
2 CFR § 41.50(b).

3
4 The Appellants invented a way to facilitate commercial transactions. An
5 understanding of the invention can be derived from a reading of exemplary claim
6 95, which is reproduced below.

7 95. A method, comprising:

8 receiving, via a computer network, seller offer information, the
9 seller offer information comprising information indicative of:

10 (i) a seller,

11 (ii) an item being offered for sale by the seller,

12 (iii) a price at which the item is being offered for sale,

13 and

14 (iv) one or more characteristics of the item;

15 determining, based on the one or more characteristics of the
16 item, a quality class of the item;

17 receiving buyer offer information, the buyer offer information
18 comprising information indicative of:

19 (i) a buyer,

20 (ii) an item the buyer desires to purchase,

21 (iii) a price the buyer is willing to pay for the item the
22 buyer desires to purchase, and

23 (iv) a desired quality class of the item;

24 receiving credit card account information associated with the buyer;

25 storing the seller offer information and buyer offer information; and

26 determining, via a processor, whether the item desired for purchase
27 by the buyer and the item being offered for sale by the seller
28 correspond.

1 This appeal arises from the Examiner's Final Rejection, mailed January 6,
2 2006. The Appellants filed an Appeal Brief in support of the appeal on May 31,
3 2006, and the Examiner mailed an Examiner's Answer to the Appeal Brief on
4 August 10, 2006. A Reply Brief was filed on September 7, 2006.

5 PRIOR ART

6 The prior art reference of record relied upon by the Examiner in rejecting the
7 appealed claims is:

8 Ojha	US 6,598,026 B1	Jul. 22, 2003
9		(May 25, 1999)

10 We also make the following art of record:

11 Lewis Copeland and Lawrence W. Lamm, ed., *The Everyday Reference Library –*
12 *An Encyclopedia of Useful Information*, 942-57 (1953).
13

14
15 REJECTION

16 Claims 95-97 stand rejected under 35 U.S.C. § 102(e) as anticipated by
17 Ojha.
18

19 ISSUES

20 The issues pertinent to this appeal are

- 21 • Whether the art applied describes determining, based on one or more
22 characteristics of an item, a quality class of the item.
- 23 • Whether the art applied shows providing a buyer an opportunity to commit
24 to buy an unavailable item at a later time.

1 In particular, the Appellants contend that the Examiner misinterpreted Ojha
2 in that model information is not equivalent to a quality class (Br. 18-19) and that
3 Ojha fails to show items that do not correspond, but only pricing for the same item
4 not corresponding (Br. 19-20).

5
6 **FACTS PERTINENT TO THE ISSUES**

7 The following facts pertinent to these issues are supported by a
8 preponderance of the evidence:

9 Quality classes indicate various levels of item quality (Spec. 12).

10 Ojha Fig. 5 shows a screen that searches based on various product criteria,
11 including Product Type, Media, Processor, Display Size, Speed, Manufacturer, and
12 Keywords and shows that the products list includes model series designations (e.g.,
13 ThinkPad), model number (e.g., 600), processor and processor speed (e.g., P2-
14 233), hard disk capacity (e.g., 3.2GB), system memory capacity (e.g., 32MB),
15 display size (e.g., 12.1), CD speed (e.g., 24X), and operating system (e.g., WIN95).

16 Manufacturers portray differences in quality levels among similar products
17 by their model series designations and by their model numbers within each model
18 series.

19 Processor model series designations and speeds similarly convey various
20 levels of processor quality, e.g., a Pentium 2 is of higher quality than a Pentium,
21 which is in turn of higher quality than an 80486. Similarly, for a given processor
22 series, a higher speed indicates higher quality.

1 Operating system series designations similarly convey various levels of
2 quality, e.g., WIN 2000 is of higher quality than WIN 95, which is of higher
3 quality than WIN 3.1.

4 The relative size of disk and memory capacity, of display size, and of CD
5 speed indicates various levels of item quality.

6 Thus, Ojha describes information indicative of item characteristics and the
7 search function of Ojha's Fig. 5 portrays determining based on these characteristics
8 a quality class of the item.

9 Ojha incorporates by reference U.S. Pat. No. 5,794,207 for a system that
10 allows a prospective buyer to communicate a binding purchase offer (Ojha, col. 1,
11 1. 64 – col. 2, 1. 10).

12 Ojha describes automatically determining one or more similar products in
13 response to a buyer requesting market information for a new product (Ojha, col.
14 14, ll. 23-33).

15 Ojha describes responding to a purchase bid with an offer for a related
16 product (Ojha, col. 17, ll. 60-61).

17 Ojha teaches that its negotiations may be binding or non-binding (Ojha, col.
18 21, ll. 29-40).

19 Claim 96, the sole claim in which the issue of whether the art applied shows
20 providing a buyer an opportunity to commit to buy an unavailable item at a later
21 time arises, does not recite that commitment actually occurs nor that commitment
22 is more than unilateral. Thus, any opportunity for a buyer to unilaterally affirm a
23 decision to purchase an item whenever it becomes available is such an opportunity.

1 The search feature within Ojha provides the opportunity to continue seeking such
2 an item, thus providing this opportunity.

3 Thus, Ojha describes providing a buyer an opportunity to commit to any of
4 its transactions.

5 ANALYSIS

6 *Claims 95-97 rejected under 35 U.S.C. § 102(e) as anticipated by Ojha.*

7 The above findings of fact demonstrate by a preponderance of substantial
8 evidence that

- 9 • The art applied describes determining, based on one or more characteristics
10 of an item, a quality class of the item.
- 11 • The art applied suggests providing a buyer an opportunity to commit to buy
12 an unavailable item at a later time.

13 As to the Appellants' contention that model number is not equivalent to
14 quality class, as the above facts demonstrate, model numbers that indicate relative
15 quality among similar items would have been considered by a person of ordinary
16 skill in the art to be a species of the genus of quality class descriptors.

17 As to the Appellants' contention that, as to claim 96, Ojha fails to show an
18 instance where the items desired and available do not correspond, it is clear that in
19 any system there will be such instances, and, as shown above, Ojha describes such
20 a case. In such a case, the buyer has the opportunity to unilaterally affirm a
21 decision to purchase an item whenever it becomes available.

1 Accordingly, we conclude that the Appellants have not shown that the
2 Examiner erred in the rejection, and we sustain the Examiner's rejection of claims
3 95-97 under 35 U.S.C. § 102(e) as anticipated by Ojha.

4
5 NEW GROUNDS OF REJECTION UNDER 37 C.F.R. § 41.50(b)

6 Pursuant to 37 C.F.R. § 41.50(b), we enter the following new grounds of
7 rejection: Claim 96 is rejected under 35 U.S.C. § 103 as obvious over Ojha in view
8 of the notoriously well known practice of customer commitment through purchase
9 and sales orders in the face of inventory shortages, as evidenced by Copeland.

10 Copeland describes the various commercial activities that must be performed
11 by a customer and vendor in a purchase and sale transaction as far back as 1953.
12 Copeland describes customers committing to purchases evidenced by purchase and
13 sales orders on p. 947 and 955 and those orders being filled subsequently when
14 stock is currently unavailable on p. 955.

15 The above facts demonstrate that Ojha meets the very broad limitations of
16 claim 96. However, if claim 96 were construed to require an actual commitment in
17 the case of item unavailability, this would be no more than exercise of the
18 notoriously old and well known purchase order that remains open and sales order
19 that is backlogged .

20 Open purchase and sales orders are evidence of a commitment by purchaser
21 and seller to purchase and sell an item that will be available at a later time. Any
22 sales system, such as that described by Ojha, will conventionally incorporate sales
23 order transaction capability that recognize customer purchase orders because the
24 degree of its commercial use and acceptance requires it when inventory is
25 insufficient to meet current demand.

1 Thus, Ojha in view of the notoriously well known practice of backlogging sales
2 orders as evidenced by Copeland suggests providing a buyer an opportunity to
3 commit to buy an unavailable item at a later time.

4 DECISION

5 To summarize, our decision is as follows:

- 6 • The rejection of claims 95-97 under 35 U.S.C. § 102(e) as anticipated by
7 Ojha is sustained.
- 8 • A new ground of rejection of claim 96 under 35 U.S.C. § 103 as obvious
9 over Ojha in view of the notoriously well known practice of customer
10 commitment through purchase and sales orders in the face of inventory
11 shortages, as evidenced by Copeland, is made under 37 C.F.R. § 41.50(b).

12 Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides
13 "[a]ppellant[s] may file a single request for rehearing within two months from the
14 date of the original decision of the Board."

15 In addition to affirming the Examiner's rejection(s) of one or more claims,
16 this decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b)
17 (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off.
18 Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides "[a] new
19 ground of rejection pursuant to this paragraph shall not be considered final for
20 judicial review."

21 37 C.F.R. § 41.50 (b) also provides that the Appellants, WITHIN TWO
22 MONTHS FROM THE DATE OF THE DECISION, must exercise one of the
23 following two options with respect to the new ground of rejection to avoid
24 termination of the appeal as to the rejected claims:

1 (1) Reopen prosecution. Submit an appropriate amendment of the
2 claims so rejected or new evidence relating to the claims so rejected, or both,
3 and have the matter reconsidered by the examiner, in which event the
4 proceeding will be remanded to the examiner

5
6 (2) Request rehearing. Request that the proceeding be reheard under §
7 41.52 by the Board upon the same record

8
9 Should the Appellants elect to prosecute further before the Examiner pursuant
10 to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35
11 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of
12 the affirmance is deferred until conclusion of the prosecution before the Examiner
13 unless, as a mere incident to the limited prosecution, the affirmed rejection is
14 overcome.

15 If the Appellants elect prosecution before the Examiner and this does not
16 result in allowance of the application, abandonment or a second appeal, this case
17 should be returned to the Board of Patent Appeals and Interferences for final action
18 on the affirmed rejection, including any timely request for rehearing thereof.

1 No time period for taking any subsequent action in connection with this
2 appeal may be extended under 37 C.F.R. § 1.136(a1)(iv) (2006).

3 AFFIRMED – 37 C.F.R. § 41.50(b)

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17 *WALKER DIGITAL*
18 *2 HIGH RIDGE PARK*
19 *STAMFORD, CT 06905*
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